In The

Supreme Court of the United States

October Term, 1977

No. 77-376

COMMERCE TANKERS CORPORATION and VANTAGE STEAMSHIP CORP.,

Petitioners,

vs.

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Respondent.

REPLY BRIEF OF COMMERCE TANKERS CORPORATION

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In this case, Commerce Tankers Corporation ("Commerce") and Vantage Steamship Corp. ("Vantage") (collectively, "petitioners") pray that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Second Circuit entered in the above entitled case on April 15, 1977. Separately, the respondent, National Maritime Union of America, AFL-CIO ("NMU"), has sought certiorari (Docket No. 77-358). The rules of this Court permit a reply brief addressed to arguments first raised in the briefs of opposition (Rule 24).

The Opinions Below, Statement of Jurisdiction, Questions Presented, and Statement of the Case are set forth in the Petition. Additional factual matter and relevant legal arguments are set forth in Commerce's Brief in Opposition filed in Docket No. 77-358.

ARGUMENT

I.

The issues presented and not disposed of by respondent's reference to the Norris-LaGuardia provisions.

Petitioners, relying on the authority of *United States Steel Corp. v. United Mine Workers*, 456 F.2d 483 (3d Cir. 1972), *cert. denied*, 408 U.S. 923, correctly asserted that this case poses a direct conflict between the Circuits on the validity of the so-called injunction bond limitation rule. The NMU distinguishes *United States Steel* on the grounds that the Third Circuit also invoked the plain language of Section 7 of the Norris-LaGuardia Act, 29 U.S.C. §107 in a case only involving counsel fees.[1] Such a narrow reading of the Third Circuit's decision is clearly

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1. The Union argues that §7 does not apply to actions instituted under §301 of the Labor Management Relations Act ("LMRA"). In fact, the extent to which injunctions issues in a labor dispute require an accommodation of the LMRA with §7 of the Norris-LaGuardia Act is not a settled issue. *Granny Goose Foods, Inc. v. Teamster Local 70*, 415 U.S. 423, 445 n. 19 (1974). At the same time, the NMU implies that it "relied on the injunction bond rule" and that any "retroactive" change would operate "harshly and unfairly" on the Union, which claims special "privilege" as a member of a protected class under Norris-LaGuardia. If the provisions of Norris-LaGuardia apply to this labor dispute, the NMU cannot pick and choose the provisions it likes. In any event, *this* Union did not rely on the injunction bond rule. There is no evidentiary support for a claim that the NMU, or its counsel, even knew that such a "rule" existed when they obtained the injunction. (See Petition, p. 10, n. 10.)

inadvisable.[2] There is no meaningful difference in the statutory language requiring a "security bond" in a Rule 65 proceeding and the substantively identical language requiring such a bond in a labor dispute covered by the Norris-LaGuardia Act.[3] Furthermore, there is no legislative history indicating that Congress intended to create such an obtuse distinction, or that Congress ever considered, in enacting either provision, the possibility that the "security" it was demanding of parties urging a court to act preliminarily would serve as a permanent "limit" to the liability of such a party.[4] In any event, Congress, cognizant of the labor implications of provisions for injunctive relief, expressly provided when Rule 65 was adopted, that the Rule does not modify any statute of the United States in actions affecting employer and employee (Rule 65(e) FRCP).

For the reasons set forth, Commerce does not place "special weight" on the provisions of the Norris-LaGuardia Act (Pet. 8, n. 6). This is not a "disclaimer of reliance" but a statement of

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2. The Third Circuit reviewed the governing law and wrote: "No Supreme Court authority which has been called to our attention holds that the liability of a plaintiff who has been improperly granted an injunction is limited to the amount of the bond . . . ." 456 F.2d at 492. The Third Circuit could hardly have been unaware of *Meyers v. Block*, 120 U.S. 206, 211 (1887) (in which no bond was required), since it was cited within the authorities expressly referred to by the Court.

3. To permit comparison, the lengthy provisions of Rules 65 and 65.1 FRCP and of §107 of the Norris-LaGuardia Act are set forth in full in Appendices A and B hereto, respectively.

4. In the view of Commerce, the injunction bond limitation rule is neither expressly nor impliedly included in Rule 65. The Union argues otherwise. Commerce claims that if the "security" Congress provided by Rule 65(c) is a *statutory* limit to recovery, then Rule 65(c) is unconstitutional. Accordingly, Commerce has, pursuant to 28 U.S.C. §2403, certified to the Attorney General the fact that the constitutionality of such Act of Congress has been drawn into question.

our view that it is inconceivable that a different result should obtain whether the injunction in this labor dispute was sought under Rule 65 FRCP or §7 of the Norris-LaGuardia Act.[5]

II.

The NMU's arguments demonstrate that the error in remand is important to the administration of the labor laws.

Petitioners also seek certiorari on the grounds that the instructions of the Court of Appeals on remand clearly diverge from a recent precedent of this Court on the complex interaction of the labor laws and antitrust laws. *Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100,* 421 U.S. 616 (1975).[6] In *Connell,* this Court held that even legitimate

5. Petitioners do not suggest the elimination of the preliminary injunction from the arsenal of available judicial remedies in labor disputes or otherwise. Nor do we intend to infer that so-called "public interest" plaintiffs be held strictly liable for wrongful injunctions issued at their behest. All we urge is that this Court affirm the basic premises of Rule 65: A preliminary injunction is "by its very nature, interlocutory, tentative, provisional, *ad interim,* impermanent, mutable, not fixed, or final or conclusive, characterized by its for-the-time beingness. It serves . . . to keep the parties, while the suit goes on, as far as possible in the respective positions they occupied when the suit began." See *Hamilton Watch Co. v. Benrus Watch Co.,* 206 F.2d 738, 742 (2d Cir. 1953). The judicially created "bond" limitation is a direct repudiation of these words since it makes "permanent" the erroneous preliminary relief and deprives a party forever of its remedy for being required to obey the plaintiffs will *pendente lite. Adolph Coors Co. v. A & S Wholesalers, Inc.,* 1977-2 CCH Trade Cases ¶61,655 (10th Cir. 1977), relied on by the Union in its Petition and Brief in Opposition, is an apt example of the misconstrued extent of the supposed rule, and in that sense actually supports the grant of certiorari herein.

6. The Union argues in footnote 13 that this case is "poles apart" from *Connell* because "nothing in the clause applied to Vantage's other vessels . . . ." That is a misstatement of fact. The challenged provision required any purchaser of an NMU vessel to assume "all of the terms and conditions" of the agreement. One of the terms was fleetwide representation. Anyway, ample proof of the NMU's purposes is obvious from its conduct. If it only wanted to "extend" its jurisdiction, it would not have sought to "restrain" the transfer, "impinging" on Vantage's wholly lawful right to increase its fleet by acquisition.

purposes would not absolve a labor union from antitrust liability for a secondary boycott. But, the opinion below proposes to remand Commerce's claim to the District Court for a determination of the NMU's purposes in effecting the boycott, which the Union claims is "essential" in order that "consideration" be "given to the nature and legitimacy of the purpose of the challenged provision." (Brief in Opp., p. 11). The NMU has, however, already had the benefit of a hearing before the NLRB, enforcement proceedings, and a full trial below, and it has not suggested any additional fact finding which could, consistent with *Connell,* in any way insulate it from liability.

In *National Woodwork Mfrs. Ass'n v. NLRB,* 386 U.S. 612 (1967), this Court held that the "touchstone" of legality under §8(e) was "whether, under all the surrounding circumstances the union's objective was the preservation of work for [the employer's] employees, or whether the agreements . . . were tactically calculated to satisfy union objectives elsewhere." *Id.* at 644-45. The Court fatefully predicted that the test would not always be simple to apply. *Ibid.* In this litigation, it has already been determined that "the NMU's motivation was to protect the Union's interest, rather than the interest of the work unit and its members." 486 F.2d at 912. (See dissenting opinion of Judge Lumbard, Pet. 21a.) By remanding for yet another determination of the Union's "objectives," the issue of "objectives" would become totally convoluted, creating a new class of secondary boycotts — those with "purposes" which are unlawful under the *National Woodwork* test, but "good" enough to save the Union from all liability. If there could be a prescription to insure another round of hot cargo clauses, this is it.

Thus, permitting this case to be remanded on "cursory, general" instructions presents a substantial risk that clear congressional intent in the adoption of §8(e) will be frustrated. As Justice Stewart wrote in *Connell:*

> "[T]he signatory of a purely voluntary agreement that violates §8(e) is fully protected from any damage that might result from the illegal 'hot cargo' agreement by his ability simply to ignore the contract provision that violates §8(e). If the union should attempt to enforce the illicit 'hot cargo' clause through any form of coercion, the employer may then bring a §303 damages suit or may file an unfair labor practice charge with the Board. See 29 U.S.C. §158(b)(4)(B). Since §8(e) provides that any prohibited agreement is 'unenforcible and void,' any union effort to invoke legal processes to compel the neutral employer to comply with his purely voluntary agreement would obviously be unavailing." 421 U.S. 649 n.9 (dissenting opinion).

This case poses the fact situation which Justice Stewart predicted could not occur. The NMU urges that unions should be entitled "in good faith" to specific enforcement of agreements arguably violative of §8(e)[7] because to do otherwise would "chill resort to arbitration and increase resort to self-help" (Brief in

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7. The NMU, possibly at the vanguard of the labor movement, argues that notwithstanding §8(e), (i) unions may make secondary boycott agreements with employers — including those who consent "in ignorance," (ii) arbitrators should grant specific performance of such agreements, and may not even hear evidence addressed to the "legality" thereof; (iii) the party to be boycotted is not entitled to notice of or representation at the arbitration; (iv) arbitral awards are enforced in proceedings under Section 301 of the LMRA, and therefore neither the employer nor the boycotted party is entitled to the protections of the Norris-LaGuardia Act in the enforcement action; and (v) should it be finally determined that the boycott was unlawful, the damaged parties should be limited to the amount of the bond (in arbitrations, usually nothing) for their relief. If this argument holds up, §8(e) might as well be declared judicially abandoned.

Opp., p. 5). That is pure bunk. "Self-help" to enforce secondary boycotts is already actionable under §303 of the LMRA, and resort to "real" arbitrations will continue to be the most effective means of resolving most labor disputes, whatever the disposition of this case. What really would be "startling and perverse" is if Congress suddenly discovered that secondary boycott agreements were not "void and unenforcible," but judicially declared merely "voidable," capable of enforcement through arbitrations, lawsuits, and threats thereof[8] until voided, and that unions are not liable for damages caused by such actions.

III.

An important issue of procedural due process is presented by this case.

The constitutional right to procedural due process in private civil litigation is not questioned by the NMU. While "due process" does not entail a rigidly fixed formula, Commerce asserts that the right implies an evidentiary hearing including sworn testimony, the opportunity to produce witnesses and documentary evidence, and to cross-examine adversary witnesses before property can be disposed of with finality. None of those elements were present in the "unusual" proceedings which resulted in the arbitral award of injunctive relief, or the preliminary injunction enforcing the award. Nonetheless, the NMU Brief in Opposition (p. 10) asserts that the petitioners' due process argument "borders on the frivolous" because "a federal

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8. Aware of the problem caused by "threats" of legal action to enforce §8(e) clauses, the General Counsel of the NLRB has urged, thus far with limited success, that such threats aimed at the collection of fines or other "punitive" damages are within the ambit of Section 8(b)(4). General Counsel's Report, 4 CCH Labor Law Rep. ¶9051, at 15288-89 (1/24/75). But, no one has focused on the problem of specific enforcement. Compare Jones, *Specific Enforcement of Hot Cargo Provisions in Collective Bargaining Agreements by Arbitration and Under Section 301(a) of the Taft-Hartley Act*, 6 UCLA L. Rev. 85 (1959), written prior to the adoption of §8(e).

court granted the time-honored remedy of preliminary injunction after notice, submission of affidavits and memoranda, hearing before the Court,[9] and participation of counsel at all stages."

This argument by the Union requires a reexamination of the pertinent facts.

On December 23, 1970, Commerce owned and operated a vessel worth $2,750,000. Exercising a wholly lawful management prerogative, and for pressing business reasons, Commerce agreed to sell the vessel and go out of the business. *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 270 (1965). In making the sale, Commerce obtained an oral promise by the buyer to deal with the labor relations consequences of the transaction, a promise which to the businessmen[10] involved seemed entirely consistent with common sense notions of successorship. See *Howard Johnson Co. Inc. v. Hotel and Restaurant Employees*, 417 U.S. 249 (1974).

In an unprecedented proceeding, the NMU did *not* seek to attempt to extend its jurisdiction to the buyers's operation of the vessel, but to restrain the transfer. The Union *never* filed a statement of claim or otherwise notified Commerce or Vantage that it would seek injunctive relief.[11] Demand for such relief was

9. Rule 65 FRCP contemplates an evidentiary hearing. No such hearing was held in this case. See *Securities and Exchange Commission v. Frank*, 388 F.2d 486 (2d Cir. 1968); *Sims v. Greene*, 161 F.2d 87 (3d Cir. 1947). But see *Drywall Tapers, et al. v. Cement Masons' Int'l Ass'n*, 537 F.2d 669, 674 (2d Cir. 1976).

10. Commerce was represented in the sale by officers of its parent company with no prior experience in the industry and neither knowledge nor notice of the internecine practices of the competing maritime unions.

11. Commerce first appreciated on February 4, 1971 that Vantage would not "take care of" the NMU and immediately sought a meeting with the Union. On Friday, February 5th, the Union orally advised Commerce that it would not waive the clause, and that it would seek injunctive relief.

made without any pleading and orally only at the "meeting" with the arbitrator held on February 8th. Commerce begged for a 72-hour adjournment to bring the issues being arbitrated into focus, a request which was denied, literally at the insistence of the NMU. There is no dispute that Referee Kheel took no evidence, heard no witnesses, maintained no transcript and granted the Union everything it asked for after a 20-minute "proceeding"[12] (Record, 362-65a).

The next day, the NMU commenced the action seeking confirmation of the arbitral award, and obtained a temporary restraining order ("TRO").[13] On February 12th, Vantage filed unfair labor practice ("ULP") charges against both Commerce and the NMU, and on February 16th, Vantage moved to intervene in the District Court proceedings. After full argument, District Judge Wyatt determined to permit Vantage's intervention and to dissolve the TRO on the grounds that enforcement of the NMU restraint-on-transfer clause raised "a serious question" of antitrust violation; but Judge Wyatt did not grant the application to vacate the arbitral award of injunctive relief because the NMU motion to confirm such award was on the calendar for February 23rd, as it happened before Judge Frankel.[14]

12. To assert, as the Union does, that there was no need for a hearing because Commerce admitted it had contracted to sell the vessel without securing the NMU undertaking, is outrageous. A hearing before Referee Kheel would have eliminated the District Court's subsequent "guesswork" as to the circumstances of the sale, and exposed the unusual history of the restraint-on-transfer clause, a history which the Union counsel sought to hide up to and including at the trial of this action. See Appendix C hereto, 6a, 32a.

13. We reiterate that the NMU did not notify Vantage, a party actually named in the arbitration award (Record, 4a), Commerce, or the attorney known by them to be Commerce's principal counsel, of the application for the TRO. Attorney Simon, who was notified, made no argument or other presentation to Judge Wyatt (Record, 366a).

14. Judge Wyatt's order was signed the night of Monday, February 22nd, with all parties then before him. The Union could have addressed its "preliminary injunction" motion to Judge Wyatt, who had already heard arguments relevant thereto, but chose instead to present it to a different federal judge, obviously for a "second" chance at the injunctive relief it needed in order to avoid submitting the controversy to the NLRB.

The NMU's counsel then submitted an affidavit "in support of plaintiff's motion for a preliminary injunction." No such motion had been previously noticed,[15] and this "procedural impropriety" was to complicate the events which followed.

All counsel appeared before Judge Frankel on the morning of February 23rd. Before there was any argument, Judge Frankel made an offer to disqualify himself in the proceedings on the grounds that he had previously represented employers in the industry. Commerce's counsel stated that he wanted to consider the issue, and the matter was put to the end of Judge Frankel's calendar. Commerce decided not to seek disqualification,[16] but to urge the Court to refer the matter back to Judge Wyatt, a request which Judge Frankel rejected.

In the late afternoon of February 23, 1971, the NMU "motions" came to be heard by Judge Frankel in unrecorded oral argument.[17] Concededly, all sides had an opportunity to argue, but neither side had any opportunity to present witnesses

15. The notice required by Rule 65(a) implies a hearing in which the defendant is given the opportunity to oppose the application and prepare for such opposition. *Granny Goose, supra,* 415 U.S. at 434 n. 7; *Klaus v. Hi-Shear Corporation,* 528 F.2d 225, 235 (9th Cir. 1975). The burden was on the NMU to demonstrate its entitlement to injunctive relief. *North American Coal Corp. v. Local Union 2262,* 497 F.2d 459, 465 (6th Cir. 1974).

16. At the time, Commerce did not know, and fully trusts that Judge Frankel did not know, that the restraint-on-transfer clause had been privately agreed to by Mr. Edward Silver, a personal friend and former law partner of the District Judge. In the District Court, Commerce affirmatively asserted that it did not claim any ethical impropriety in Judge Frankel's hearing the original motion to confirm, but offered to prove that he would not have been an "unbiased" judge for a full trial (Record, 1304-06a).

17. In response to footnote 11 in the Brief in Opposition, Commerce does not deny that on oral argument it stipulated that Judge Frankel "might treat the motion as one for a preliminary injunction," but does deny that that stipulation in any way whatsoever constituted an "acquiescence" to the relief, or the Union's improper procedures which were, in fact, vigorously protested.

or cross-examine witnesses. The NMU told its side of the story to Judge Frankel in an affidavit served less than twenty-four hours earlier. Neither Commerce nor Vantage had any opportunity to respond to the NMU papers, or to cross-examine the NMU's affiant.[18] In fact, neither company put in further papers at that time. The NMU says that the companies' submission of lengthy affidavits and briefs on the motion before Judge Wyatt cures the abuse of procedural fair play which occurred in the application for a preliminary injunction. That argument has, under similar circumstances, been directly rejected by this Court. *Granny Goose Foods Inc., supra,* 415 U.S. 423, 442.

On the basis of the NMU's counsel's unanswered affidavit and without the benefit of an evidentiary hearing, Judge Frankel wrote a blistering opinion[19] granting the NMU a preliminary injunction, although postponing for "reasons of at least a technical nature" a formally final decision of the motion to confirm the arbitrator's award of injunctive relief. Judge Frankel indicated that once Vantage's answer was filed (it had been filed

18. What, for example, would the NMU have said if it were asked to produce Commerce's agreement to the restraint-on-transfer clause? That it was lost, but that every other company had signed? (Appendix C, 7a). Then, what would the NMU have said if it were asked to produce the other companies' agreements which it allegedly had? (Appendix C, 12a). That they were discarded? (Appendix C, 23a). Or, would it finally have admitted that in fact "nobody . . . was asked to sign Article I, Section 2" (Appendix C, 27a), but that it was "due to an oversight" (Appendix C. 29a). We categorically state that if there had been an evidentiary hearing before Referee Kheel, as requested by Commerce, Judge Frankel never would have written the opinion granting the preliminary injunction (Appendix C, 32a). The denial of due process was the direct cause of the harm.

19. In footnote 12 of the Brief in Opposition, the NMU "emphatically disagrees" with our assertion that Judge Frankel's "characterization of the conduct and motives of the companies was later proven to be unfounded." Judge Frankel's decision was rendered on March 2, 1971. In the six years since the *preliminary* ruling, there have been three evidentiary trials relating to this dispute, and not a single tribunal has adopted Judge Frankel's "assessment" of

(Cont'd)

on March 1st), he was prepared to confirm the arbitral award.[20] Commerce expressly raised and never waived the due process arguments arising from the total lack of a hearing prior to the arbitral award of injuction. Judge Frankel gave "short shrift" to these arguments terming them "mere quibbles" as to the arbitrator's procedure. This constitutional issue cannot possibly evaporate because Commerce "had counsel" or because such counsel raised arguments which were summarily rejected by the District Court without evidence in a preliminary determination, later reversed.

It is difficult to see how the Union finds comfort in the holding in *Brault v. Town of Milton,* 527 F.2d 730 (2d Cir. 1975)[21] in which Judge Mansfield wrote:

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the facts. [See *McLeod v. National Maritime Union,* 329 F. Supp. 151 (S.D.N.Y. 1971), *rev'd,* 457 F.2d 1127 (2d Cir. 1972); *Commerce Tankers Corp.,* 196 N.L.R.B. No. 165 (1972), *enf'd sub nom. NLRB v. National Maritime Union,* 486 F.2d 907 (2d Cir. 1973), *cert. denied,* 416 U.S. 970 (1974); and the decision of District Judge Griesa reprinted in the petition, particularly 46a-48a.] Only the Union's total disregard for "due process" permits it to adhere in a brief to factual allegations which it has never supported with witnesses or evidence. There is nothing in the record which supports the Union's ugly inferences, unfortunately accepted by Judge Frankel, that Commerce knowingly and deliberately violated an obligation it recognized or participated in any kind of conspiracy to secretly transfer the vessel to the NMU's competitor union.

20. Thus, if an expedited appeal of the preliminary injunction was sought prior to action by the General Counsel on the ULP charges, the practical advantage of any such appeal might well have been mooted overnight by confirmation of the arbitral award. In light of the strong language in Judge Frankel's opinion, appeal prior to a development of the true factual record was unlikely to be successful; if successful, it would not necessarily win Commerce the practical relief required; and in either event, further federal court proceedings would engender delay by the NLRB, the agency charged with *exclusive* jurisdiction over such matters. Faced with that circumstance, Commerce urgently and continuously pressed the General Counsel to institute ULP charges.

21. The Union's only other authority, *Gryger v. Burke,* 334 U.S. 328, 331 (1948) is a clearly inapplicable and outdated holding that due process does not require a state to provide counsel to defendants who plead guilty to non-capital offenses.

> "The Court's function is to assure that no party will be deprived of property without satisfying the fundamentals of due process, including the requirement that the defendant be furnished with notice and a statement of the claim against him and the opportunity to prepare and present a defense, a hearing, the right to confront and cross-examine witnesses and findings." 527 F.2d at 738-39.

Our argument, plain and simple, is that these elements were obviously denied to Commerce at the Kheel arbitration, and in no way cured (and in some ways complicated) by the Union's shortcuts in the District Court. The grant of "preliminary" relief under such circumstances *may* not have been contrary to the constitutional requirements; but the imposition of the Union's "security" deposit as a "permanent limit" to the companies recovery would be an intolerable and inexplicable reversal of the most basic notions of fundamental fairness, and cries out for review by this Court.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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